

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

PUBLIC ASSOCIATION OF
GOVERNMENT EMPLOYEES,

Petitioner,

V.

CITY OF LINCOLN, NEBRASKA,

Respondent.

Case No. 1398

FINDINGS AND ORDER

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

DEC 09 2015

APPEARANCES:

For Petitioner

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For Respondent

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Before Commissioners Pillen, Carlson and Blake

NATURE OF THE CASE

On July 13, 2015, the Public Association of Government Employees (“PAGE”, “Union” or “Petitioner”) filed this action with the Commission, alleging that the City of Lincoln, Nebraska (“City” or “Respondent”) committed a prohibited practice in violation of the Nebraska Industrial Relations Act (“Act”) when Respondent unilaterally changed and refused to bargain with Petitioner regarding the days of work in a work week, the work schedule of PAGE Bargaining Unit Members (“Employees”), the imposition of a Mandatory Standby Plan (“Plan”) for 24-hour coverage and the creation of new 12-hour work shifts.

A trial was held September 10, 2015, before the Honorable Sarah S. Pillen.

FACTS

The Petitioner and the Respondent have a Collective Bargaining Agreement (“CBA”) in place that governs the period of August 14, 2014 through August 31, 2016.

The CBA contains several sections of interest. Regarding hours of work and duty shifts, Article 18 of the CBA provides:

“Section 1. Eight (8) consecutive hours, exclusive of lunch, shall constitute a day’s work and five (5) consecutive calendar days shall constitute a week’s work. From time to time, ten (10) hour working shifts, exclusive of lunch, may be made available. When ten (10) hour working shifts are available, the option, within demand constraints, to work these shifts will be made available to employees working eight (8) hour shifts. When an employee elects to change his work shift to either an eight (8) hour or ten (10) hour work shift, he may not, without management consent, again change his work shift from eight (8) to ten (10) hours or from ten (10) hours to eight (8) hours.

Section 2. Each employee shall be entitled to two (2) or three (3) days off each week which shall be consecutive, unless in conflict with shift or other assignments.

Section 3. An employee may elect to change hours of work and duty shifts, with the consent of the employee’s Department Head, in which case Sections 1 and 2 would not apply and hours worked and duty shifts would become forty (40) hours per work week.

The employee may request in writing to return to his previous hours and duty shifts at the beginning of any following work week with seven (7) days notice upon approval of Department Head.”

(Ex. 1, p. 32).

Regarding management rights, Article 3 of the CBA provides:

“Section 2. The Union acknowledges the concept of inherent management rights. These rights, powers, and authority of the City include, but are not limited to the following:

C. The right to establish, allocate, schedule, assign, modify, change, and discontinue City operations and work shifts, so long as changes in days off, shifts, and working hours, other than in emergencies, which shall include but not be limited to, unplanned absences, are made only after the order for such change has been posted for seven (7) calendar days; except in instances which affect a single work crew or a single employee, the City will make a good faith attempt to deliver such notice.”

(Ex. 1, p. 5).

Article 19 of the CBA provides for the alteration of shifts in emergencies.

“Section 5. ALTERATION OF ORDINARY SHIFT Except for those employees that are on paid on-call or standby status, an employee may be called into work on a shift that is not his or her regular shift on a mandatory basis only when there is an emergency. For the purposes of this clause, an “emergency” shall mean those circumstances in which the City or any part thereof is suffering or is in imminent danger of suffering from a natural disaster or other event, including floods, tornadoes, or other occurrences which will seriously and substantially endanger the health, safety, welfare or property of the citizens of the City of Lincoln as determined by the Department Head or the Mayor.”

(Ex. 1, p. 35).

Article 18, Section 3 of the CBA provides for Employees to volunteer to participate in standby status, from time to time. *Id.* For those Employees that volunteer to be in a standby status, the Employees are to be available to come in to conduct winter maintenance operations in case of inclement weather that causes snowfall on the streets of the City of Lincoln during hours outside their ordinary schedule. (18:6-19:18, 127:4-128:2)

For at least the last twenty (20) years, the participation of Street Maintenance Division Employees in such "standby" status and participation in winter maintenance activities during periods of time outside the Employee's regular schedule has been done on a purely voluntary basis. (18:6-19:18, 127:4-128:2)

The Street Maintenance Manager sought to remedy a perceived problem of understaffing for winter maintenance activities. On December 26, 2014, the Street Maintenance Manager acknowledged the past practice of voluntary standby and the necessity of an emergency declaration before Employees could be compelled to work outside their regularly scheduled shifts. (192:6-200:18). Sometime between January 2, 2015 and January 16, 2015, Employees represented by the Petitioner became aware of the Respondent's intent to adopt a new mandatory Plan that could be implemented without the pre-condition of a declaration of an emergency. Specifically, Respondent's Plan would require Employees to be available to work on a 7-days per week basis during winter months, subject to irregular shifts, including working 12-hour shifts on a rotating 12-hours on/12-hours off basis. During these periods of time, there would be no provision for two or three consecutive days off as also provided for in the CBA. (Ex. 33, 49:11-52:20).

Upon learning of this proposed Plan, the Petitioner's Union President requested to meet with the Respondent's representatives to discuss the intentions of the Street Maintenance Division, and request to bargain. At a meeting on January 16, 2015, the Street Maintenance Manager advised the Petitioner of his intentions to implement mandatory standby duty. (Exhibit 7, 35:5-16) The Petitioner responded with a request to bargain before implementation of the Plan by the Respondent.

On or about January 22, 2015, the Public Works Director for the City of Lincoln met with representatives of the Petitioner. The Petitioner advised the Respondent that it believed that it had the right to bargain over any proposed changes to Employee work schedules and the standby policy and made such a demand. The Public Works Director advised the Petitioner that she wished to find a negotiated solution to the matter, if possible, and requested that the President of the Petitioner meet with the relevant Employees to hear their concerns and return with any proposal or discussion topics that might be relevant to the discussions between the parties. She also advised that that she would halt any implementation of the policy issued by the Street Maintenance Manager to facilitate such further discussions between the parties.

On January 27, 2015 the Petitioner met with Employees and heard their concerns about the proposed Plan. On January 28, 2015, the Petitioner met with the Public Works Director to discuss the concerns of the Employees regarding the Plan. On January 29, 2015, the Public Works Director, Street Maintenance Manager and Petitioner's Union President met with Employees at each Street Maintenance District shop. On January 30, 2015, Respondent implemented its Plan, without having reached an agreement with the Petitioner. (Ex. 20, Ex. 21, Ex. 23).

On March 18, 2015, the parties agreed to reinstate negotiations with regard to standby scheduling for winter operations. The Respondent agreed at that time to cease scheduling Employees to work any schedule outside the employee's regular shift on a mandatory basis for a 30-day period. Instead, the parties agreed that the Respondent would use or create standby lists to be filled on a voluntary basis, so long as the Union committed to assist the Respondent to ensure full staffing on a voluntary basis, and that the Respondent would be permitted to mandatorily staff Employees in the event of an emergency, as already provided for in the CBA.

DISCUSSION

Petitioner alleges that Respondent committed a prohibited practice when it unilaterally implemented and refused to bargain in good faith over a Plan that would permit Respondent to alter Employees' ordinary shift schedule, change the number of days worked in a particular work week, and alter Employees' entitlement to days off, without a declaration of emergency or meeting the contractual notice requirement.

Respondent argues that the Commission lacks jurisdiction to hear the case. Respondent also argues that the changes implemented by its Plan are not mandatory subjects of bargaining; that they are permitted by the CBA; or are within the Respondent's management rights.

Jurisdiction

The Commission finds that it has jurisdiction to determine whether the Respondent has committed a prohibited practice. Respondent contends that the Commission lacks jurisdiction to hear this case, as it amounts to a breach of contract claim which requires the Commission to interpret and apply terms and conditions of an existing CBA. The facts in this case constitute a viable prohibited practice claim; which this Commission has been given jurisdiction to adjudicate by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. See *Nebraska Ass'n of Public Employees, Local 61 v. State of Nebraska Dep't of Correctional Services*, 19 CIR 13 (2014), *South Sioux City Educ. Ass'n v. South Sioux City Public Schools*, 16 CIR 12 (2008), *aff'd* 278 Neb. 572 (2009); *Ewing Educ. Ass'n v. Ewing Public Schools*, 12 CIR 242 (1996). Petitioner has successfully invoked the jurisdiction of the Commission.

Mandatory Subjects of Bargaining

The Nebraska Industrial Relations Act only requires parties to bargain over mandatory subjects. There are three categories of bargaining subjects: mandatory, permissive, and prohibited. Mandatory subjects are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." NEB. REV. STAT. § 48-816(1)(a). Additional mandatory subjects of bargaining are those which "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County*, 16 CIR 401 (2010). In particular, the Commission has held that work schedule changes that are primarily related to an employee's hours of work are those which "vitally affect" the terms and

conditions of employment, and must be bargained for. *Nebraska Association of Public Employees, Local 61 v. State of Nebraska Dept. of Correctional Services*, 19 CIR 13 (2014). Failure to bargain for any changes to these items is a per se violation of the Act and a prohibited practice.

In order to establish working guidelines as to what constitutes a mandatory subject of bargaining, the Nebraska Supreme Court in *Metro Technical Community College Education Ass'n* set forth the following test:

“A matter which is of fundamental, basic, or essential concern to an employee’s financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiations even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.”

Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area, 203 Neb. 832, 842 (Neb. 1979).

Mandatory subjects of bargaining are not just topics for discussion during negotiations. Unless clearly waived, mandatory subjects must be bargained for before, during, and after the expiration of a collective bargaining agreement. *Omaha Police Union Local 101 v. City of Omaha*, 15 CIR 292 (2007).

In considering the definition of the various subjects of bargaining, decisions of the National Labor Relations Board (“NLRB”) are instructive but not controlling. *Crete Educ. Ass'n v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 21 (2002).

The NLRB has long held that hours are a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 349 (1958). The term “hours” has been held to mean work schedules and whether there should be Sunday work. See *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), enforcement denied on other grounds, 161 F.2d 949 (6th Cir. 1947). The NLRB has specifically held work schedules to be mandatory subjects of bargaining. *T-West Sales & Service*, 346 N.L.R.B. 132 (2005); *Pepsi-Cola Bottling Company of Fayetteville, Inc.*, 330 N.L.R.B. 900 (2000) (employer unilaterally changed starting time for an employee

in violation of NLRA...unilateral schedule changes unlawful where it affected how employees could arrange their workday); *Our Lady of Lourdes Health Center*, 306 N.L.R.B. 337, 339 (1992).

International Brotherhood of Electrical Workers Local 763 v. Omaha Public Power District, 19 CIR 119 (2015).

A topic can be established as a subject of bargaining if it has been a past practice between the parties. "An employer has a duty to not change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *NLRB v. Katz*, 369 U.S. 736, 745-747 (1962). To establish past practice, the practice must have occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 N.L.R.B. 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 N.L.R.B. 349, 353 (2003), *enfd.* Mem. 112 Fed.Appx. 65 (D.C. Cir. 2004).

"[A]n employer's practices, even if not required by a collective bargaining agreement, which are regular and longstanding, rather than random and intermittent, become terms and conditions of unit employee's employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change." *Service Employees International Union Local 226 v. Douglas County School District 001*, 17 CIR 428 (2012), *aff'd* 286 Neb. 768 (2013) (citing *Sunoco, Inc.*, 349 N.L.R.B. 240, 244 (2007)).

International Brotherhood of Electrical Workers Local 763 v. Omaha Public Power District, 19 CIR 119 (2015).

NEB. REV. STAT. § 48-816(1)(a) defines good faith bargaining as the "performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...". The Act does not require parties to agree to any proposals put forth in negotiations, only that the parties "confer in good faith" about those subjects which are subjects of bargaining. Section 48-824(1) states that it is a prohibited practice for any public employer to refuse to negotiate in good faith with respect to a mandatory subject of bargaining. In *NLRB v. Katz*, the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining

before impasse are per se violations of the party's duty to bargain in good faith. 369 U.S. 736, 737 (1962).

"The Commission determined that an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission.(internal citations omitted) If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith."

Communication Workers of America, AFL-CIO v. County of Hall, Nebraska, 15 CIR 95 (2005). See also *Service Employees International Union (AFL-CIO) Local 226 v. Douglas County School District 001*, 286 Neb. 755 (2013).

In *Nebraska Association of Public Employees, Local 61* the Commission found that:

"[T]he Pilot Program proposed by Respondent is the type of work schedule change which would be primarily related to an employee's hours and would "vitally affect" the terms and conditions of employment. As such, a new scheduling program such as the Pilot Program proposed by Respondent is a mandatory subject of bargaining. Respondent's failure to bargain with Petitioner regarding the Pilot Program is a per se violation of the IRA and a prohibited practice."

Nebraska Association of Public Employees, Local 61 v. State of Nebraska Dept. of Correctional Services, 19 CIR 13 (2014).

The Program at issue in that case was voluntary. However, the voluntary nature of that Program did not change the fact that employee work hours are a matter for negotiations. It is clear that a change to employee work hours, such as that implemented by the Respondent herein, would also be a mandatory subject of bargaining.

The Commission finds that the Plan unilaterally implemented by the Respondent would "vitally affect" the hours and terms and conditions of employment. Further, the Commission finds that the past practice of voluntary standby has been in place for at least 20 years and occurred with such regularity and frequency that Employees could reasonably expect the practice

to continue or reoccur on a regular and consistent basis. As such, the Commissions finds that the Plan implemented by the Respondent is a mandatory subject of bargaining.

Respondent had a duty to bargain in good faith with Petitioner regarding implementation of the Plan. Respondent did not meet the conditions discussed above as set forth in *Communication Workers of America*, 15 CIR 95 (2005), before implementation of the Plan. Therefore, the Commission finds that Respondent's unilateral implementation of the Plan is a per se violation of the Act and a prohibited practice.

With respect to the meetings between the parties about the Plan, the Public Works Director and the Street Maintenance Manager intended to implement the Plan without any further bargaining. (Ex. 7, Ex. 20, Ex. 21, Ex. 23, 35:5-16). However, as a per se prohibited practice has been found, further analysis of good faith bargaining is unnecessary to the resolution of this case. See *Communication Workers of America, AFL-CIO v. County of Hall, Nebraska*, 15 CIR 95 (2005); *Service Employees International Union (AFL-CIO) Local 226 v. Douglas County School District 001*, 286 Neb. 755 (2013).

Management Prerogative and Staffing

Some subjects are considered management prerogatives and may generally be altered at the will of the employer. See *Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area*, 203 Neb. 832 (1979). The Commission has used a relationship test in determining bargaining issues. "Whether an issue is one for bargaining under the Court of Industrial Relations Act depends upon whether it is primarily related to wages, hours and conditions of employment of the employees, or whether it is primarily related to formulation or management of public policy." See *Coleridge Educ. Ass'n v. Cedar County School Dist. No. 1-1-0541. a/k/a Coleridge Community Schools*, 13 CIR 376 (2001).

In the present case, Respondent argues the changes implemented by its Plan are staffing issues within its management rights. It is true that the Commission has found "staffing" to be management prerogative in several cases.

"Issues related to daily staffing and overall staffing requirements are management prerogatives. See *Professional Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, 16 CIR 408 (2011). Issues of staffing related to "scheduling work such as daily staffing, staffing by rank, and overall staffing requirements are management prerogatives. See also *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972). In *Professional*

Firefighters Ass'n of Omaha, Local 385, the Commission stated that these recognized staffing issues are management prerogatives because those staffing issues are more closely related to the assignment of work.

Employees United Labor Association v. Douglas County, 17 CIR 195 (2011) (Assignment of work to non-bargaining unit employees is a daily staffing issue).

The types of changes to Employees' hours, work schedules and days off as implemented by Respondent's Plan are not management prerogative "staffing" issues as contemplated by the Commission in the cases cited above. Instead, the Plan is a "type of work schedule change which would be primarily related to an employee's hours and would "vitally affect" the terms and conditions of employment." *Nebraska Association of Public Employees, Local 61 v. State of Nebraska Dept. of Correctional Services*, 19 CIR 13 (2014). This is a mandatory subject of bargaining as discussed above.

Additionally, Respondent claims that it can force the Plan under the current CBA. This position appears to have first been asserted after the unilateral implementation of the Plan, in defense of this petition. (192:6-200:18). The CBA defines hours of work and duty shifts, notice requirements and emergency changes that appear to vary from the Respondent's Plan. However, the Commission declines to interpret and apply terms and conditions of an existing CBA.

REMEDIAL AUTHORITY

In its Petition, Petitioner prays that the Commission declare Respondent's unilateral changes to work schedules and hours of work of the Employees to be a prohibited practice under the Act. Further, Petitioner requests that the Commission order Respondent to cease and desist implementing any change to the schedule of work that creates new 12-hour shifts, continuous 24-hour scheduled rotating shifts or that would not provide for at least two consecutive days off in a work week. Petitioner requests that the Commission order Respondents to cease and desist from creating a mandatory standby policy for the Employees or creating a mandatory rotating shifts. Petitioner also seeks costs incurred in bringing this action including, but not limited to, attorney's fees.

The Commission has the authority to issue cease and desist orders following findings of prohibited practices and has done so in the past. See *Local Union 571 International Union of Operating Engineers v. County of Douglas*, 15 CIR 75 (2005); *Ewing Education Ass'n v. Holt*

County School District No. 29, 12 CIR 242 (1996) (en banc). In the present case, the Commission finds that the Respondent has committed a prohibited practice under the Nebraska Industrial Relations Act. Therefore, an order requiring that the Respondent cease and desist from committing the prohibited practice is clearly within the authority of the Commission and will be ordered.

The Commission has authority to award attorney's fees, but has found it to be an appropriate remedy in cases where an employer's misconduct was flagrant, aggravated, persistent, and pervasive. See *Fraternal Order of Police, Lodge No. 8 v. Douglas County, et. al.*, 16 CIR 401 (2010). Respondent's actions in this case do not rise to the level deemed appropriate for the award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

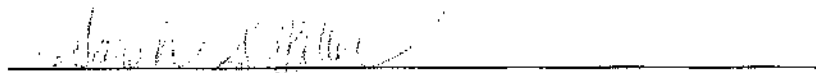
IT IS THEREFORE ORDERED that Respondent shall:

1. Cease and desist from failing to bargain in good faith with the Public Association of Government Employees regarding mandatory subjects of bargaining.
2. Cease and desist from unilaterally implementing its Mandatory Standby Plan or any other change to the work schedules and hours of work of the Employees without first bargaining to impasse.

All Panel Commissioners join in the entry of this Order.

Entered December 9, 2015.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Sarah S. Pillen, Commissioner